Supreme Court, U. S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

No. 77-883

MICHAEL DAPPOLONIA,

Appellant,

vs.

BOARD OF CHIROPRACTIC EXAMINERS OF THE STATE OF FLORIDA,

Appellees.

APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

PETITION FOR REHEARING

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INDEX

	PAGE
QUESTION PRESENTED.....	2
GROUNDS FOR PETITION FOR REHEARING.....	2
CONCLUSION.....	6
APPENDICES.....	8
A. TRANSCRIPT OF REVOCATION HEARING	8

INDEX OF AUTHORITIES

CASE	PAGE
Buckman v. State Board of Accountancy, 300 So3d 671 (1974)	4
Smith v. Department of Registration and Education, 412 Ill. 332, 106 NE2d 722	4
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 416	4
ICC v. J - T Transport Company, 368 U.S. 81	6

STATUTES

The Florida Statutes Annotated Administrative Proceedings Act 120.53 (1)(d)	2
The Florida Statutes Annotated Administrative Proceedings Act 120.54(1) and (1)(a)	2 2

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PETITION FOR REHEARING

Pursuant to Rule 58(1) of the Supreme Court of the United States, Appellant, Michael Dappolonia, files this Petition for Rehearing of this case and to reconsider and set aside the Order dismissing this appeal entered on February 21, 1978, on the following substantial grounds available to the petitioner, although not previously presented.

QUESTION PRESENTED

Whether Dr. Michael Dappolonia was deprived of his Chiropractor's license without due process and equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution when the Appellee revoked the Appellant's license without giving the Appellant notice of the time and place of the Revocation Hearing, and denying the Appellant's counsel an opportunity to be heard at the Revocation Hearing.

GROUNDS FOR PETITION FOR REHEARING

As grounds for this Petition for Rehearing, the Appellant attaches Appendix A and calls the Court's attention to pages one (1) through eight (8) which clearly show that the Appellee revoked the Appellant's license without giving him notice of the Revocation Hearing. The Florida Statutes Annotated Administrative Proceedings Act 120.53(1)(d) states in part as follows: "... In addition, each agency shall give notice of meetings, hearings and workshops in the same manner as that prescribed for rulemaking in Subsection 120.54(1),...The notice shall include a statement of the general subject matter to be considered and shall be given not less than 7 days before the event." Further, Florida Statutes Annotated Administrative Procedures Act 120.54(1)(a) states as follows: "...Except as otherwise provided in this paragraph, the notice shall be mailed to the committee, to all persons named in the proposed rule, and to all persons who have made requests of the agency for advance notice of its proceedings at least 14 days prior to

such mailing. The agency shall also give notice as is prescribed by rule to those particular classes of persons to whom the intended action is directed..."

Clearly from reading the transcript of the Revocation Hearing, Appendix A, page 2, lines 3 through 16 show that the Appellee conducted the Hearing under the mistaken assumption that the law did not require notice to the Appellant. The above-quoted language of the Administrative Procedures Act states that "The notice shall be mailed to...all persons named in the proposed rule ..." and then continues the language with a conjunctive "and", not a disjunctive "or". The Appellant did not have to carry the burden of making a request that he be notified of the Revocation Hearing, as was prescribed by the Appellee at the Hearing.

Further, when the Appellant's attorney, Mr. Bowen, asked the Appellee, "Could I address the Board concerning the recommended Order", see Appendix A, page 21, lines 3 and 4, the Appellee discussed the matter in pages 21 through 26 and voted to deny Mr. Bowen's request, see specifically Appendix A, page 26, lines 8 through 15.

These two votes of the Appellee, (1) To proceed with the Revocation Hearing without having given notice to the Appellant, and (2) To deny the Appellant's counsel to discuss the merits of the proposed revocation of the Appellant's license, were two substantial and fundamental constitutional violations by the Appellee and clearly demonstrated the arbitrary and capricious manner in which the Appellant's license was revoked in the Hearing.

As previously stated in the Appellant's jurisdictional statement, there is an important Florida case on point, namely, the case of Buchman v. State Board of Accountancy, 300 So3d 671 (1974) which held that "Statutes permitting revocation of occupational licenses are penal in nature", and on page 673 of this same decision followed this statement and, citing from another case, said "...The rule is that, where Statutes of this kind are invoked, the provisions of the Statutes must be strictly followed, because the Statute, as hereinbefore stated, is penal in its nature". Further on in this decision on page 674, the Court reinforced this proposition of law, saying "Earlier we stated that when rights of life, liberty or property are materially affected by the exercise of official administration discretion, due process of law must be offered to the proceedings". Also see Smith v. Department of Registration and Education, 412 Ill. 332, 106 NE2d 722 as typical statements of law in that "So serious a proceeding as to revoke the license of a doctor, due process requires a definite charge, adequate notice, and a full, fair and impartial hearing".

The very essence of the Florida Administrative Procedures Act is to provide affected parties with an opportunity to respond to rules or orders that affect their substantial interest. Omitted from our previous jurisdictional statement was the weighty point of whether the "Agency decision was based on a consideration of relevant factors in the case and whether there had been a clear error of judgment", see the case of Citizens to Preserve Overton Park v. Volpe, 401 U.S.416. The Court cited the well-known authority on administrative law, Professor L. Jaffe, with reference to his statement on "Abusive discretion", stating as follows: "...Broadly stated, an abuse of discretion is an exercise of discretion in which a relevant consideration has been given an exaggerated and unreasonable weight, at the expense of others. The 'letter' has been observed; the 'spirit' has been violated. Discretion implies a 'balancing'. Where the result is eccentric, either there has not been a 'balancing'; or a hidden and maybe an improper motive has been at work."

Our situation parallels Professor Jaffe's description. Here the alleged use of a machine which is used only in the process of diagnosis, e.g., checking a patient's level of vitality; a machine applying electronics to the most ancient methods of diagnosis and one used successfully by the Appellant with hundreds of patients for many years; a machine which the complaint against the Appellant does not even allege ever resulted in harm to anyone - for this, the Appellant is to be deprived of his license to practice his profession and is to lose the good reputation and massive patient approval he has built up in twenty-two years of practice. The Naturopathic school of the healing art approves of the machine and it is under the license to practice naturopathy that the Appellant used the machine. But even if he were guilty of using this machine, unauthorized by schools of chiropractic, as was found by the Hearing Examiner, is there evidence here that there has been a "balancing" of the factors involved? Would not discretion suggest a far less drastic discipline than revocation of his license?

Another factor is the welfare of hundreds of patients that look to the Appellant for health care. The Appellant operates Napier Clinic, which is probably the largest chiro-

practic clinic in the city of Orlando, Florida. It is certainly the largest such clinic served by a single doctor. Utmost discretion is important in weighing a proposal to disrupt a relationship like this. Here certainly there is a demand that: "...The agency must make findings that support its decision, and those findings must be supported by substantial evidence. (ICC v. J - T Transport Company, 368 U.S. 81)

With adequate notice and opportunity to be heard, every material statement promulgated by the Examiner could have been disproved, had there been a Hearing on his recommended Order.

CONCLUSION

For the reasons herein stated, it is respectfully suggested that the Court vacate the Order dismissing the Appeal of this Appellant and restore the case to the calendar for argument.

Dated this 13th day of March, 1978.

J. Michael Carter
Post Office Box 566
Crawfordville, Florida 32327
(904)926-3647

CERTIFICATE OF COUNSEL

TO: Robert Shevin, Florida Attorney General and Charles J. Ruberg, Assistant Attorney General

I, J. Michael Carter, attorney for the Appellant, Michael Dappolonia, certify that the foregoing petition is presented in good faith and not for delay.

Dated this 13th day of March, 1978.

J. Michael Carter
Post Office Box 566
Crawfordville, Florida 32327
Attorney for Appellant

CERTIFICATE OF SERVICE

I, J. Michael Carter, a member of the Bar of the Supreme Court of the United States, and as counsel for the Appelant herein, hereby certify that I have this day served three (3) printed copies of the foregoing Petition for Rehearing and appendices thereto on the Appellee herein, by depositing same in a United States Post Office with first class postage prepaid addressed to counsel of record for the Appellee, as follows: Robert Shevin, Florida Attorney General and Charles S. Ruberg, Assistant Attorney General, Department of Legal Affairs, Office of Attorney General, the Capital, Tallahassee, Florida, 32304, this 14th day of March, 1978.

J. Michael Carter
Attorney for Appellant

STATE OF FLORIDA, DIVISION OF PROFESSIONS, DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATIONS, FLORIDA STATE BOARD OF CHIROPRACTIC EXAMINERS

IN RE: The Revocation of the License of Michael Dappolonia

Meeting of the Florida State Board of Chiropractic Examiners, held on THURSDAY, JULY 15, 1976, at City Hall, 400 South Orange Avenue, Orlando, Florida.

Board of Chiropractic Examiners
6501 Arlington Expressway Building
Suite 202
Jacksonville, Florida 32211

BOARD MEMBERS:

JACK HENDRICKS, D.C., Vice President

PAUL VOGEL, D.C., Secretary-Treasurer

C. M. HARTLEY, Coordinator

STANLEY S. KAPLAN, D.C.

WALTER AIKEN, D.C.

RONALD L. HARRIS, D.C.

CAROL REILLY, Assistant Attorney General

* * * * * * *

JOHN W. BOWEN, ESQ., of Rowland and Petruska, 308 North Magnolia, Orlando, Florida, for Dr. Dappolonia.

ANK SARLI CSR

P R O C E E D I N G S

(The following proceedings dealt with Dr. Dappolonia:)

MS. REILLY: He spoke to me prior to the board's meeting. I think before I would review the hearing officer's recommended order with y u, I'd like to tell you that Mr. Bowen feels that he should have had notice of this meeting and that he should have had an opportunity to address the board.

It's my position that the law and the rules under which the board operates puts the burden on him to come forward and request an opportunity and that he did not do so and that we are not required to give him notice.

If the board wishes to at this time, they could delay the consideration of this order and give Mr. Bowen an opportunity to present exceptions on the order and to prepare statements. We could not do that today because the board's prosecuting counsel is not here. And, of course, the board's prosecuting counsel has had no notice either. He

is in exactly the same position as Mr. Bowen is.

However, as your legal advisor, we have operated in the past, as you know, and it's my feeling that we are operating correctly, if the party whose license is under question does not request further appearances before the board, the board is under no obligation to hunt up that party and drag them in. So I think the first issue would be simply whether or not we want -- I think you all have been copies of the recommended order. I think the first decision to make would be whether or not we want to continue this proceeding until some later date to give Dr. Dappolonia and his attorney a chance to prepare a presentation to the board. If not, then he would like to enter an objection for the record so that he would have remedy in a court later at some point if he chose.

Then once we have decided that, if you would, I can go ahead and review

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the recommended order.

DR. HENDRICKS: Point of information, when was the board presented that information?

MS. REILLY: The recommended order was issued by the hearing officer on April 16.

MR. HARTLEY: Received in our office on April 26th.

MS. REILLY: Right. And at our meeting the 28th. I believe at that time we distributed copies. We may not have had a copy for every board member.

DR. HENDRICKS: One was the 28th.

MS. REILLY: The April 28th meeting.

MR. HARTLEY: For the record, sir, it was determined at that time that the respondent's time to file exceptions had not concluded and therefore, the board would defer the matter to this meeting.

DR. HENDRICKS: Point I wanted to bring out, it's already been before the board and was deferred because, what, ten day time had not lapsed. Which is the time Carol Reilly is referring to for benefit of the new board member. So we did defer to allow the counsel representing

Dr. Dappolonia to petition the board for such a presentation. In the absence of that petition or request, we are here today to consider the matter for determination, as I understand it. That's what's just been presented.

The question now before the board is, as counsel just stated, is whether or not the board wishes to deviate from its agenda and grant Mr. Bowen an opportunity to present his remarks.

Now, we have that option, correct, Ms. Reilly?

MS. REILLY: What we would have to do is to defer consideration of this matter until the next meeting.

DR. HENDRICKS: Not hear Mr. Bowen either?

MS. REILLY: Not really.

MR. BOWEN: On the merits?

MS. REILLY: That's right. Not on the merits. We would want the board's prosecuting counsel to have an opportunity also to prepare, because you see, I cannot really advise you and oppose Mr. Bowen at the same time.

DR. HENDRICKS: Any members of the board have a question on the procedure before us at the moment? Could I ask then for the board's pleasure? Is a motion in order?

MS. REILLY: I think it would be.

DR. VOGEL: Just one point of discussion?

DR. HENDRICKS: That is why I asked were there any other questions.

DR. VOGEL: I believe this was quite clear there was ample opportunity to file exception to the hearing officer on this, and as Ms. Reilly pointed out, it's not within the province of this board to seek out the counsel representing the defendant in the matter.

I think we ought to go along with the recommended order since the attorney's going to be filing.

MS. REILLY: You are making, if I might comment, you are saying that we should not defer consideration beyond today for the purpose of hearing any other arguments by counsel?

DR. VOGEL: Yes, ma'am.

MR. BOWEN: Could I have an opportunity to

comment on the procedure?

DR. HENDRICKS: Not at the moment. You will, perhaps. But right now I want to hear, I want to be sure my board understands what's going on. Any other questions on procedure? Okay, what is the board's pleasure?

MR. HARTLEY: For the purpose of the record, the motion is not to grant a continuance of this matter.

DR. HENDRICKS: If a motion is to be made, it would be that motion. In absence of such a motion.

MR. HARTLEY: I thought he made one.

DR. VOGEL: I move that we deny granting the continuance at this time.

DR. KAPLAN: I second the motion.

DR. HENDRICKS: I don't know why the motion is in order since there has been no real request, unless you are making request on behalf of counsel.

DR. VOGEL: No, you are.

MS. REILLY: I thought I was asking the board to consider whether or not they would deviate from --

DR. HENDRICKS: Through you. So now you have so moved to deny the request?

DR. KAPLAN: I second it.

DR. HENDRICKS: There is a second. Any second on the motion? All in favor "aye."

(All members so respond.)

DR. HENDRICKS: All oppose, same sign.

MS. REILLY: I think that Mr. Bowen's under the impression that he has a righ. to participate in that part of the discussion.

DR. HENDRICKS: Was I correct in my procedure?

MS. REILLY: I think so.

DR. HENDRICKS: Now, if we want to hear any comments, we may. What I mean is, comments, that's what I want to know.

MR. HARTLEY: He could have spoken on the question, you could have heard him before you voted.

MS. REILLY: I think that maybe I have caused some confusion. I think the alternatives that were before the board were whether or not they would deviate from the agenda as it's set now. And put the consideration of the recommended order off until the next meeting.

DR. HENDRICKS: Could we not now hear him now during the discussion of the action we are going to take?

DR. VOGEL: We already took the action.

MS. REILLY: I think we have already said he could not speak. The other alternative would be then to decide that he could not speak and that, allow him to enter an objection for the record. I think the board acted correctly. I don't think he has a right to participate in the board's deliberations as to whether or not they would hear him.

DR. HENDRICKS: I asked the board if they had a clear understanding of the procedure, and they indicated they did, and so voted.

DR. VOGEL: You were correct, Mr. Chairman.

DR. HENDRICKS: We will now ask the attorney of the board to present the order to the board.

MS. REILLY: Let's allow Mr. Bowen to make his objection now.

DR. HENDRICKS: If you will, Mr. Bowen.

MR. BOWEN: What we have, I think, is a

disagreement on legal opinion between Ms. Reilly and myself concerning the interpretation of administrative procedures act and the model rules under which you proceed. For the record, I'd like to state that I was never notified by the agency nor was my client notified by the agency, the agency being the Board of Chiropractic Examiners, about the proposed order which would trigger the time period running, which would tell me that I have 15 days within which to file exceptions to the order and request oral arguments.

MS. REILLY: You did receive that notice from the hearing officer.

MR. BOWEN: After reviewing what you have there and my file this morning, it came back to me that what I was waiting for was for notification from the agency. The hearing officer sent me a copy of his proposed order, and the way I interpret the difficult provision that we have there, which I think your attorney will advise you there is a

typographical error in the regulations of the state department, that could throw one off.

But, nevertheless, my interpretation was that I was waiting for transmittal from the Board of Chiropractic Examiners, a copy of the proposed order from the hearing officer, which I interpreted as triggering the 15 days within which to file the exceptions and request for oral arguments.

The first that I heard of any action by the board was in this morning's Orlando Sentinel, in an article that was written on a related matter concerning my client. And it mentioned in passing in there, in the article, that the meeting was to be held at 10:00 a.m. this morning to consider this matter.

I see, and would like to state in the record that that article, I am sure, has been read by everybody here, at least one board member was reading it this morning here at the meeting. Which

is another reason I would like a chance to address the board on this because the article is extraneous to the charges before the board considered today, and I think the article is rather inflammatory and might cause prejudice against my client in the board considering unrelated charges to the news article that appeared in the paper this morning.

What I would like to do for the record, which I requested informally through your counsel, and have already had a motion on that, I would like to request that the board delay action on this matter so that I would have an opportunity to appear and present oral arguments with your counsel that represented you at the hearing before the hearing officer to be there and have the equal opportunity to present his side also.

At a later meeting, at the next meeting that would allow me time to make a presentation on the merits and let's

talk about the merits because there are some serious problems with the proposed order that I have been waiting to address to this board for their ruling on this. I think nothing would be hurt by delaying and we'd request this board to take action to delay in view of the ambiguity of the regulation.

I can understand it might not be unclear to Ms. Reilly, but it wasn't unclear to me as to proper procedure, and both of us interpreted it an entirely different way, which happens with lawyers all the time.

And, in view of that, I would request of the board to grant a continuance on this until its next meeting, wherever the meeting is -- not requesting it be here -- but we would be able to appear and present pertinent data to the board for your consideration in making your decision concerning the proposed order. And would make that request that we do be allowed that time. Right now the time I have had to prepare

is read the paper and come down here, and when I called my client at 9:40, he had not read the morning paper and didn't even know about the hearing himself.

And I would think that it wouldn't hurt to let us have notice of when the meetings are going to be and provide us with notice we are on the agenda. That would have been the minimum notice that would have provided us an opportunity to appear. I don't think anything would be hurt by delaying. We'd request the board reconsider its motion that was made prior to my request for continuance.

DR. HENDRICKS: Let's have our counsel respond.

MS. REILLY: This is an awkward position because I am your legal advisor and I am not -- it's not my desire to get into an adversary position. But I would like to point out that under the administrative procedures act and the law there, the proposed order which Mr. Bowen thinks he has a right to receive from the board is defined as the same thing as the

recommended order which is delivered by the hearing officer.

The notice you have received, and I would like the board to understand this clearly, is exactly the same notice that anyone else in your position has received. There would be in the absence of your request to provide briefs or exceptions or oral arguments, there would be no reason to put you on notice that this matter was on the agenda because the board would not have its prosecuting counsel here. There would be no argumentative proceedings taking place.

However, as you say, there is no harm in waiting, possibly. We know that the hearing officer has recommended revocation of Dr. Dappolonia's license for using instruments that are not, whose use is not taught in chiropractic colleges. So there may be no harm in waiting, there may be harm in waiting. The administrative procedures act is a boondoggle. It's only been in existence

for two years. I work with it every day. Some other lawyers don't. A lot of people have different ideas about what it means. Theoretically, courts should decide what it means. But perhaps if a man's livelihood is in question, maybe we could agree at this point that Dr. Dappolonia would not use the instruments in question between now and such time as the board meets again and you have an opportunity to present these arguments. I think that would be a fair trade. And that would be my proposal.

MR. BOWEN: I don't have the authority to agree on that with my client, but I would strongly recommend it and urge that he would -- I will agree as his counsel that that would be agreeable and if it's not agreeable with him, I would contact you and, of course, the alternative would be that the board action would -- I don't think he would object to going along with that recommendation.

MR. HARTLEY: Why don't we, if that's a question, I think the board should take a few

minutes' recess and let him contact his client to see if it's acceptable.

DR. HENDRICKS: That is if the board wants to do -- .

MR. BOWEN: If I might say one thing concerning what Ms. Reilly said, I can agree with her on the administrative procedures act because I, too, represent a major governmental unit that is bound by the administrative procedures act, and I can understand the differences in interpretation concerning specific provisions of the act and the model rules themselves.

DR. HENDRICKS: I'd like, if I may, have the board discuss the recommendation Ms. Reilly has made.

DR. VOGEL: Very important issue here, Mr. Chairman, that while this board sits as a board of chiropractic examiners, we do not sit as a board of naturopathy examiners. We have an individual here who is a dual licensee. You can commit him and we can, should we decide to change our position, you can commit your

client to chiropractic restrictions; certainly we have no authority in the area of naturopathy. And this presents a problem to this board because anything that this man does wrong as a naturopath reflects on the chiropractic profession and certainly our interests as the chiropractic profession, but more so the people that chiropractic serves.

And being, the fact that this man is a dual licensee alone, I would make recommendation to my board that we stick to the decision we have just held because the man certainly can continue practicing as a naturopath. We have no control over that. I wouldn't want any more problems to occur to this board as a governing body in the area of chiropractic. So I feel that we would be performing our function in protecting the public by not reconsidering our decision.

DR. HENDRICKS: By proceeding with the order?

DR. VOGEL: Proceeding definitely with this order. It's imperative, I think.

DR. HENDRICKS: Have any other comments?

DR. KAPLAN: The attorney mentioned we read that article. That article appeared today. That has no bearing whatsoever on the decision that was made by the adminis rative hearing, which was a few m nths ago, I believe.

MR. BOWEN: Right. That is true.

DR. KAPLAN: So this could not affect anything we say whatsoever excep for the fact whether it's a stay or it being granted. The administrative hearing officer laid down the rules for revocation prior to that article, so that would not have affected any decision that we could have made or they could have made.

MR. BOWEN: That decision is by the hearing officer's recommended order and not binding on the board. And the board takes final action is what I was saying.

DR. HENDRICKS: That's a separate matter. That does not in any way have to do with this particular case. Any other comments by the board?

DR. KAPLAN: One other thing. Was this meeting,

this is a public meeting?

MS. REILLY: This meeting today?

DR. KAPLAN: It has been advertised.

MS. REILLY: Yes. There is one other point I should make. By law, we are required to issue our final order within 90 days of the hearing officer's recommended order, so we should keep that in mind, and if the board were of mind to delay, we'd have to agree to delay that also.

DR. HENDRICKS: It would appear to the chair that the board has proceeded in due course as at least our counsel interprets the administrative procedures act, and I would therefore ask that the attorney do present to the board at this time the recommended order in light of the board's immediate past decision.

DR. VOGEL: I second the motion.

DR. HENDRICKS: We have already moved that we are going to proceed. Has been no motion to reconsider, but I will, out of fairness, ask, is there a move to reconsider on the board? If there is, I will entertain it at this time. If

not, Ms. Reilly, you present the recommended order to the board.

MR. BOWEN: Could I address the board concerning the recommended order?

MS. REILLY: I think that's what the discussion was about. Our counsel is not here.

MR. BOWEN: Could I ask for a ruling from the board just for the record, because I'd like to request to address the board concerning important matters and deficiencies I feel exist in the recommended order and would like an opportunity to point these out to the board. Before they consider the final action, agency action on the recommended order.

MS. REILLY: He just wants to get this into the record.

DR. HENDRICKS: That was your objection.

MR. BOWEN: I would object to the board proceeding without giving me an opportunity to, since I am here, to speak on this, although I haven't had time to prepare.

DR. HENDRICKS: I believe that is what the

board understood and acted on.

..OWEN: The board was acting on a request for a continuance of this so I could appear at the later one. Now I am requesting an opportunity to address the board concerning the recommended order before the board now that you will be considering.

..DRICKS: Thank you for that clarification.

..EL: We deny --

..DRICKS: (Interposing) It is so noted, correct, by the secretary that this request has been made of Mr. Bowen. Mr. Hartley, do you have any need for clarification of this request? All right, Ms. Reilly, do we need a motion on that?

..LLY: Yes, why don't you have a motion.

..DRICKS: May I have a motion regarding Mr. Bowen's request at this time?

..EL: I move that we deny the request of Mr. Bowen.

..DRICKS: Is there a second? If not, it dies for lack of a second.

..EL: Does the board fully understand -- they just voted something a moment ago.

I don't know if they understand what's happening.

DR. HENDRICKS: Did the board understand the motion Dr. Vogel made? Just now? Denying Mr. Bowen's request?

DR. VOGEL: He, excuse me, he should have filed exceptions. He did not file exceptions. Do you understand? Does the board fully understand what Ms. Reilly might explain? He had to file exceptions under the law. He did not file exceptions. Right now, he wants to talk about exceptions. It's irregular. You already voted him past one point. Now we are just moving further in a proper direction to deny any further reading of this because we are trying to go into the final order that Ms. Reilly would be reading.

DR. AIKEN: Aren't we saying by not going ahead on our motion, that we'd like to hear what he has to say?

MS. REILLY: No.

MR. BOWEN: That is what I thought.

MS. REILLY: I believe that your motion was to

deny Mr. Bowen's request; his request was to address the board at this time as to the merits of the recommended order. The substance of the recommended order. Mr. Vogel's motion would deny him.

DR. HENDRICKS: And therefore, with no second, we would proceed in allowing Mr. Bowen --

MS. REILLY: (Interposing) I am sorry, yes.

DR. VOGEL: That would be tantamount to allowing him to go ahead with the exceptions which he did not file. I hope you understand that you are actually ruling against something you voted on a few minutes earlier.

DR. HENDRICKS: That was exactly what I was trying to explain before.

MR. BOWEN: The other motion, if I might clarify it --

DR. HENDRICKS: (Interposing) What are you clarifying?

MR. BOWEN: Clarifying my request and motion, I would like just an opportunity to maybe give this clarification that might help you proceed.

The first request was to delay

the proceedings so th.: I would have an opportunity to appear in the future.

DR. HENDRICKS: You have done that.

MR. BOWEN: Right, and that was denied. The second request was an opportunity to speak to the board now concerning the merits of this --

DR. VOGEL: (Interposing) Not the merits of this, sir. You are talking about the merits of the recommended order by the hearing officer.

MR. BOWEN: Right.

DR. HENDRICKS: That's the difference in the two motions.

MR. BOWEN: Is to allow me to speak today on these things and all I am requesting is that opportunity to address you today on that and the motion was made to deny that.

DR. HENDRICKS: This motion doesn't accomplish the same thing the earlier motion would have. In delaying, you would have had an opportunity. So now that you haven't delayed. Dr. Vogel was trying to make sure the board understood it. He is

looking for the same clarification you are. So in effect, both of your motions are attempting to bring before the board either at a future meeting, which failed, or at this meeting, the same argument. The board understand that now? Is there a motion regarding the request?

DR. KAPLAN: Mr. Chairman, I move to deny the request.

DR. HARRIS: Second.

DR. HENDRICKS: Is there any discussion? All in favor, aye.

(All members so respond.)

DR. HENDRICKS: All opposed, same sign. Carried.

MR. BOWEN: For the purposes of my record here, am I to understand tha. I am not going to be allowed to address the board concerning the board's action on the recommended order for Dr. Dappolonia?

MS. REILLY: That's my understanding.

DR. HENDRICKS: That's my understanding and counsel agrees.

MS. REILLY: I see no reason for a court reporter to also transcribe the

proceedings. I would object to the introduction of these verbatim discussions in a court later.

MR. BOWEN: Is it the board's decision to say that I cannot have a court reporter here to record these proceedings for my own benefit, as a member of the public and as attorney of record for Dr. Dappolonia? And this I would express a strong objection and recommend that here we are getting into just a complete denial of due process. And this just offends the basic notions of due process as well as government in the Sunshine Law, and I would urge the board to strongly consider this before taking any action that would eliminate me from this meeting with my court reporter.

DR. HENDRICKS: Ms. Reilly, is there anything in the statutes that allows the board the right to deny public transcript?

MS. REILLY: Well, the board's recording of the meeting is the public record of the meeting.

DR. HENDRICKS: Is there anything that would

permit us to deny anyone from the public to come in and transcribe? We have a gentleman out there.

MS. REILLY: No, there really is not. I am wishing, mostly I wish to put Mr. Bowen on notice that I would object to the introduction of such a transcript in a court of law. It's not the record of the public meeting. It would be for his use solely.

DR. HENDRICKS: If it's my prerogative and with the board's permission, I would rule that the transcript may continue. With your objection noted.

MS. REILLY: Fine.

DR. HENDRICKS: Do you have that objection?

DR. VOGEL: It's being recorded. Mr. Hartley is up on everything.

MR. HARTLEY: If I may speak for myself, I am not. Ms. Reilly, you are objecting to the court reporter's transcription?

DR. VOGEL: For purpose of future court use.

MS. REILLY: That's my objection.

DR. HENDRICKS: We are only waiting now for Mr. Hartley to say he is caught up.

DR. VOGEL: I move we allow our legal advisor to read the --

DR. HENDRICKS: (Interposing) I don't think the motion is in order. I think we have already agendaed it and we have taken care of the necessary motion. I think now it's a matter of her proceeding. I asked her to wait until Mr. Hartley is with us. Now. Okay.

MS. REILLY: I would pass down for each of you, two of you can share a copy of the recommended order. And I will share mine with Dr. Vogel.

This is the recommended order which was delivered to the board by Ken Ayers, a hearing officer to the Division of Administrative Hearings. This is a recommended order which the board is required to take final action on this recommended order within 90 days from April 16. That is today, if a quick computation tells me. The recommended order states that by administrative complaint filed September 2nd, 1975, this board sought

to revoke the license of Dr. Michael Dappolonia, alleged that he had treated the patient by use of a diagnostic instrument not taught in the regular course of instruction in a college recognized by the Board of Chiropractic Examiners.

Also, the allegation is presented he presented medication consisting of celloids. And that he used a diagnostic instrument which was incapable of doing what he represented it to do. And therefore, he was guilty of fraud and deception in the practice of chiropractic. Which is a violation of Chapter 46013 -- what is it? 133E. It was also alleged that the chiropractor prescribed pills, the celloids, and that that was also fraud and deception of the practice of chiropractic.

The hearing officer then proceeds to discuss the, to present his findings of fact, basically, the daughter of one Carol Ann Carter, a Susan Carter had had several episodes in school where she

had passed out and routine medical exams had failed to disclose any particular, any problem. However, Mrs. Carter thought she was passing out because of a pinched nerve. Susan was taken to Dr. Dappolonia as a patient upon the recommendation of a friend of the Carters. I would suggest that I can hit the highlights of this order, but I would suggest that what would be the best procedure to follow would be for us just to sit here and take the opportunity to read it once again. I know you have all seen it and read it before.

DR. HENDRICKS: All right, the board take just a few minutes without a recess and familiarize themselves with the balance of the order.

Anyone need more time? All right. The board has concluded its reading of the recommended order. Any further comments, Ms. Counsel?

MS. REILLY: If the board members have questions, I will be glad to address

them.

As you know, the hearing officer is the fact finder in this matter. We do not have the authority to change his findings of fact without going back to the original record of the proceeding.

However, we do have the authority to revise his conclusions of law since under the law, the board members, the board itself is the appropriate body to interpret the law which it administers.

We also have the authority to reduce the penalty which the hearing officer has recommended, but not to increase it. He has determined by his findings of fact and drawn the conclusion that Dr. Dappolonia is guilty of fraud and deception in the practice of chiropractic in violation of 460133H, and he has recommended the revocation of Dr. Dappolonia's license.

DR. HENDRICKS: Anyone have any further questions of counsel?

MS. REILLY: Excuse me, I stand corrected. He's also been charged with a violation of

460133M.

MR. HARTLEY: Using unauthorized instruments.

DR. HENDRICKS: Not getting any inquiries, chair then assumes everyone understands the order. And Dr. Vogel, are you ready -- excuse me.

DR. KAPLAN: I was just going to say, is a motion in order?

DR. HENDRICKS: I just asked Dr. Vogel if he'd care to make comments or a motion at this time regarding the order. He would defer to Dr. Kaplan.

DR. KAPLAN: I move that we accept the administrative hearing officer's recommendation on this final order for revocation of Dr. Dappolonia's license.

DR. VOGEL: I second it.

DR. HENDRICKS: Dr. Vogel seconds that motion. I now entertain discussion. Dr. Aiken, do you have discussion?

DR. AIKEN: I don't have any discussion.

DR. HENDRICKS: Dr. Harris, you have any discussion?

DR. HARRIS: I have no discussion.

DR. HENDRICKS: Dr. Kaplan, any discussion?

DR. KAPLAN: I just made the motion.

DR. HENDRICKS: Dr. Vogel, any discussion?

All in favor of the motion to accept the recommended order as received and just read, in favor, aye.

(All board members so respond.)

DR. HENDRICKS: Opposed, same sign. Motion is carried.

MR. HARTLEY: I think you will instruct counsel to prepare final order.

DR. HENDRICKS: In order for the chair to instruct, I understand, counsel to prepare the final order. Chair so instructs.

DR. VOGEL: I want to move to the next item of business.

MS. REILLY: Before we leave the last item on the agenda, I did prepare a final order which adopts the hearing officer's final order and you will find it attached to the materials I passed out previously. If that meets with your approval, that can be signed today.

DR. HENDRICKS: With the chair just so instructed, which is proper, I believe,

to vote.

DR. VOGEL: I move we recess for seven minutes.

DR. HENDRICKS: At 11:27, the chair recesses for seven minutes if there is no opposing votes.

(Whereupon, the proceedings concerning Dr. Dappolonia were concluded.)

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C E R T I F I C A T E

STATE OF FLORIDA)
COUNTY OF ORANGE)

I, ANGELA WILSON, being a Notary Public and Certified Shorthand Reporter, State of Florida at Large, do hereby certify that I was authorized to and did report in shorthand the above and foregoing proceedings, and that thereafter my shorthand notes were transcribed and reduced to typewriting under my supervision; and that the pages numbered 2 through 35, inclusive, contain a full, true and correct transcription of my shorthand notes taken therein.

Done and signed this ____ day of July, 1976, in the City of Orlando, County of Orange, State of Florida.

My Commission Expires:
February 4, 1978

Notary Public & C.S.R.